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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, *Petitioner,*

v.

GRACE LINE, INC., *et al.*

No. 252

GRACE LINE, INC., *et al., Cross-Petitioners,*

v.

PANAMA CANAL COMPANY.

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief, *amicus curiae*, is filed by The Government of the United Kingdom of Great Britain and Northern Ireland, as a signatory to the Hay-Pauncefote Treaty of November 18, 1901, between the United States and Great Britain, because some of the issues in this case involve the spirit and obligations of that treaty, the common and his-

torical interpretation by both signatories of its provision for tolls, and the free flow, on a just and equitable basis, of international commerce through the Panama Canal, which is of vital concern to all nations, including the United Kingdom.

It would not be appropriate for this brief to deal with the domestic legal issues, procedural problems and accounting methods involved. But it does seem appropriate and of the highest importance, and it is respectfully hoped, of some help to this Honorable Court, that this brief recall and point out certain international obligations, and their interpretation, which were established by negotiation between the signatories to the Hay-Pauncefote Treaty and which the United States assumed as a "mandatory for civilization". The continued observance of these obligations—and their common interpretation—are vital to world trade and to the maintenance in international relations of the Rule of Law.

POINT I

The obligations of Article III, Section 1, of the Hay-Pauncefote Treaty should be maintained in this case.

Article III, Section 1, provides:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the twenty-ninth of October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable." (32 Stat. 1903).

The basic principle that the conditions and charges of traffic shall be just and equitable was willingly adopted by both signatories to the Hay-Pauncefote Treaty from Article VIII of the Clayton-Bulwer Treaty of 1850 (Canal Zone Code, p. 833). The principle was not a rhetorical flourish. It has been stated, in slightly varying form and with impressive authority by responsible statesmen of both nations as a basic, working condition to the maintenance of any canal across the Isthmus. As early as 1826, Secretary of State Henry Clay, in his instructions to the delegates to the Panama Congress, said "If a canal across the Isthmus be opened so as to admit of the passage of sea vessels from ocean to ocean, the benefit of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls." (IV, Proceedings of International American Congress, 144). The exact wording of the principle in Article III, Section 1, was apparently suggested by the British Foreign Minister, Lord Lansdowne, and "was regarded by the President as so entirely reasonable that it was agreed to without discussion." Document No. 746, 61st Cong. 3d Sess. p. 9. Moreover, the principle so clearly emphasized in both the Clayton-Bulwer and Hay-Pauncefote treaties was specifically incorporated in Article 18 of the Hay-Bunau-Varilla Treaty of 1903, between the United States and Panama, which provides: "The Canal, when constructed, . . . shall be opened upon the terms provided for by Section 1 of Article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901." (33 Stat. 2234).

This principle of "just and equitable" tolls is a basic part of the long and honorable record of negotiations between Britain and America about the building and operation of a canal across the Isthmus of Panama. And those negotiations form one of the most reassuring chapters in the history of Anglo-American relations. Britain's faith in the unselfish attitude and the practical capacity of the

United States with regard to international commerce across the Isthmus led her to agree to the Clayton-Bulwer Treaty of 1850 for a partnership in the problem. In 1901, under the Hay-Pauncefote Treaty, the United States assumed, subject to certain obligations, the sole responsibility. In 1914, by the conclusion of the so-called "Panama Canal tolls controversy", the United States again demonstrated her scrupulous attitude as a trustee for civilization and affirmed that the Rule of Law is as vital an element in international as in domestic affairs.

It is respectfully urged that the particular problems of this case should be considered in the light of the basic and enduring position of the United States in meeting its obligations under the Hay-Pauncefote Treaty, as expressed by President Woodrow Wilson and U. S. Senator Elihu Root. In his address to a joint session of Congress on March 5, 1914, President Wilson, in referring to these obligations, said: "We consented to the treaty; its language we accepted, if we did not originate it; and we are too big, too powerful, too self-respecting a nation to interpret it with a too strained or refined reading of the words of our own promises just because we have power enough to give us leave to read them as we please." Senator Root, in his classic address of January 21st, 1913, to the United States Senate, said: "By public declarations, by the solemn asseverations of our treaties with Colombia in 1846, with Great Britain in 1850, our treaties with Nicaragua, our treaty with Panama in 1903, we have presented to the world the most unequivocal guaranty of disinterested action for the common benefit of mankind and not for our special selfish advantage." (49 Cong. Rec. 1821-2). And again: "We could not have taken it (the Canal Zone) for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world. It was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization

to assert those rights, that we are entitled to be there at all." (49 Cong. Rec. 1822).

The Government of the United Kingdom is content to rest on those statements of the basic obligations of the United States under Article III, Section 1, of the Hay-Pauncefote Treaty.

POINT II

"Just and equitable" tolls should be limited "to the amount representing the fair value of the services rendered, i.e., to the interest on the capital expended and the cost of the operation and maintenance of the Canal."

This interpretation of Article III, Section 1, of the Hay-Pauncefote Treaty was given by Sir Edward Grey in his memorandum of November 14th, 1912, delivered to the United States Secretary of State, Philander C. Knox, when Britain and the United States disagreed about the exemption from tolls of American coastwise shipping. The interpretation met with no dissent from the Government of the United States at that time (although it did differ strongly with Sir Edward Grey's arguments about the exemption problem). Since then it has apparently been the commonly accepted formula, in America as well as in Britain, for determining "just and equitable tolls". An accurate interpretation was given in 1937 in a United States Senate committee hearing by H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, who stated the formula, on behalf of the operating officials of the Canal, as follows:

> "If the Canal is to be operated and maintained on a self-sustaining basis it is essential that tolls, which constitute all but a negligible portion of the revenues of the canal, should be established in relation to the capital cost of the canal and the cost of its operation and maintenance.

> The principle is now well recognized that the Panama Canal is not to be regarded as a public improvement from which no direct return is to be expected, but is to be considered and operated as a great utility of international character, constructed and maintained by the United States for the benefit of all nations upon the terms of equality prescribed by treaty, for which all commercial vessels using the canal may be expected to pay tolls which are commensurate with the costs incurred in the construction, operation, and maintenance of the canal.'"*

But the most reassuring example of the interpretation by the United States Government of "just and equitable" tolls, in accordance with the letter and spirit of Article III, Section 1, of the Hay-Pauncefote Treaty, and the memorandum of Sir Edward Grey, is in the Act of Congress of September 26th, 1950 (Canal Zone Code, Section 412 (b)) which provides:

> "Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government."

This formula is substantially that stated, without American dissent, by Sir Edward Grey, in 1912. It is admirably fortified by Senate Report No. 2531 (September 8th, 1950) as follows:

> "Basically, the primary purpose of the bill is to separate the business operations of the Panama Canal from those collateral operations which make

* Hearings before the Subcommittee of the Committee on Interoceanic Canals, United States Senate, Seventy-Fifth Congress, First Session on S. 1912, a bill to provide for the measurement of vessels using the Panama Canal, etc., and S. 2493, a bill to provide a permanent and equitable method of assessing tolls upon vessels transiting the Panama Canal, etc. P. 6, Govt. Print. Off. 1937.

up the governmental activities of the Panama Canal administration. Tolls will be calculated in accordance with a formula written into the law which will result in the operation of the Canal on a self-sustaining basis. Interest will be charged at a going rate which is approximately 2.3 per cent at the present time on the capital investment in the Panama Canal and this interest must be paid into the Treasury of the United States. In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50 per cent of the cost of the civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of the civil government would be borne by the other business activities, such as hotels, commissaries, etc. As a result, the Canal will be on a self-sustaining basis and the other collateral businesses operating in the Canal Zone must bear their proportionate share of the cost of the civil government, health, and sanitation."

The Congress of the United States also left no doubt of its intention to sustain the words and spirit of the Hay-Pauncefote Treaty when, in the Act of 1950, it incorporated the treaty by reference into Section 412(d), Tit. 2 of the Canal Zone Code.

Despite the Act of 1950, it would appear from the opinion of the United States Court of Appeals in this case (*Grace Line, et al.* v. *Panama Canal Company*, 243 F. 2d 844) that there is good reason to believe that the tolls are not compatible with the formula for determining tolls so clearly expressed by both the British and American Governments. For instance, the Court said, p. 852: "That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators." Moreover, the United States District Court (*Grace Line, et al.* v. *Panama Canal Company*, 143 F. Supp. 539, 546) seems to suggest bases, i.e., national transportation policy and foreign policy, for determining tolls not contemplated in the Clayton-Bulwer and Hay-Pauncefote Treaties and contrary to both their letter and spirit.

This apparent departure, in existing practice and in the opinion of the United States District Court, from the traditional formula stated by Sir Edward Grey and by the Act of 1950, if not rectified by this Honorable Court, could have considerable repercussions among all nations using the Canal.

The opinion of the United States Court of Appeals in this case is greatly reassuring to the United Kingdom, as a signatory to the Hay-Pauncefote Treaty, in its reaffirmation of historical and present American obligations; when it refers to that Treaty, p. 856: " . . . which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands". Moreover, the opinion of that Court repels a potential threat to the traditional Anglo-American formula for determining tolls when it says, p. 854:

> " . . . the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy."

CONCLUSION

This Court should sustain the principle of "just and equitable" tolls under Article III, Section 1, of the Hay-Pauncefote Treaty and the formula for determining those tolls as stated by Sir Edward Grey and similarly by Section 412(b) of the Canal Zone Code.

Dated, New York, N. Y.,
March 18th, 1958.

Respectfully submitted,

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